IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 458 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE R.R.JAIN and

MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ISHWAR ROOPABHAI

Versus

STATE OF GUJARAT

Appearance:

MR PV HATHI for Petitioner

Mr. K.P.Raval A.G.P. for Respondent No. 1

CORAM : MR.JUSTICE R.R.JAIN and
MR.JUSTICE H.R.SHELAT

Date of decision: 13/02/96

ORAL JUDGEMENT(Per:Shelat.J)

The appellant was tried for the offence under section 302 IPC, before the Court of the Sessions at Palanpur in Sessions Case No. 94/87, after the case was committed to the Court of Sessions, by the learned

JMFC-Desa, after receipt of the charge sheet from the police station at Desa, and came to be convicted of the offence under section 302, and sentenced to R.I. for life, consequent upon which present appeal has been preferred by him the original accused.

2. The case of the prosecution in brief, may be stated .Gangaben Bhikhabhai is the widow. She is maintaining herself by doing labour work. She resides at Desa with her son Fakirchand. Kamalaben-the deceased was her daughter. She married the appellant. After the marriage deceased Kamalaben and the appellant were residing at Desa. Initially their married life was very happy, but by passage of time dissension, between the two for one or another reason, arose. The appellant was ill-treating the deceased and therefore, often the deceased used to go to her natal-house and stay with Gangaben. At times she was, persuading, and asking the appellant not to ill treat the deceased Kamalaben but the appellant did not show any improvement. However, the appellant used to ill treat her and used to beat her. Therefore, the deceased used to leave her matrimonial home and go to her mother where she was safe. Lastly when she was made to leave the house because of beating and ill treatment from the appellant, she was at her natal- house and 3 years had passed, but the appellant was taking no care ofand was neglecting his obligation to maintain her. With no option, therefore, the deceased was constrained to prefer an application u/s 125 Cr.P.C. for maintenance. The appellant and the deceased were attending the court on every adjournment. Because of the application having been preferred for maintenance, the appellant was annoyed. On 22.3.87 in the evening, the appellant went to the natal-house of the deceased. Fakirchand the brother of the deceased and Gitaben,the sister of the deceased, had gone to witness a movie in a cinema house. At 4 p.m. or sometimes thereafter, Gangaben left the house for purchasing the vegetable. At that time Kamalaben- the deceased was alone in the house. The appellant, therefore took the opportunity of lonliness of the deceased. He went into the house, poured kerosene on the person of the deceased and then set fire to her. Immediately after the deceased was found ablazed, the appellant fled away. The deceased came out of the house shouting for help. Manguben and Hiraji her husband were accidentally passing by the road. They saw the appellant running out and the deceased being ablazed, was shouting for help. Hiraji chased the appellant but his attempts were in vain and so he came back. Manguben and Hiraji then extinguished the fire. The neighbours were then assembled. Thereafter,by a jeep

they took the deceased to the hospital for treatment . On the way Gangaben was found coming from the opposite direction. Stopping the jeep she was also appraised of the incident and made to board into the jeep. On the way to the hospital in the jeep, Gangaben made a query to the deceased to which she replied that the appellant-her husband had been to the house and pouring kerosene on her set fire. After they reached the hospital, the doctor on duty treated her and then Gangaben went to the police station and informed the police . The complaint thus came to be filed. The police officer who took the investigation on hand informed the executive magistrate to record the dying declaration. After the investigation was over, he filed the charge-sheet before the court. At the conclusion of the hearing before the then learned Sessions Judge at Palanpur, the appellant came to be convicted and sentenced as aforesaid. It is against that judgment, present appeal has been preferred before us.

3. Mr. Hathi the learned advocate representing the appellant submitted that here was a case of suicide, but unfortunately, the appellant being the husband, under misconception and assuming everything against him , was roped in falsely. The learned Sessions Judge did not appreciate the evidence on record correctly and erroneously concluded against the appellant. On behalf of the appellant several points were raised so as to assail the judgment of the Lower Court which we will be dealing, in seriatim.

4. It was submitted that the dying declaration recorded by the executive magistrate and produced at exh.,7 was highly suspicious and not reliable. It may be stated that the learned Judge has not relied upon the dying declaration recorded by the executive magistrate, Mr. G.J.Patel whose evidednce has been recorded at exh.,6. For the reasons assigned by the learned Judge below we are also of the view that the dying declaration recorded by the executive magistrate is suspicious and for one more reason also it is not reliable. Firstly it may be stated that in law , it is open to the court to place reliance on the dying declaration and convict the accused provided it is, found free from doubt and bias, trutyworthy, true , genuine and indicating the guilt of the accused . If there is any good reason to doubt the dying declaration , the court should abstain from placing reliance and concluding anything making the same to be the base. The court should try to appreciate other evidence on record and reach the conclusion that logically flow therefrom. One more ground which deters us from placing reliance on the dying declaration has on

record developed thus. The doctor whose evidence has been recorded at exh.14 and the post mortem notes exh.15, are required to be looked to. It is evident from the evidence of the doctor that there were third degree burns all over the body, and the hands were also burnt. When that is the case, the prosecution ought to have elucidated as to what extent the hands were burnt , because in this case the thumb impression of the deceased has been taken at the bottom of the dying declaration. If it is not elucidated, it must be assumed that the tips of the thumb and other fingers were also burnt and it was not possible for the deceased to put the thumb impression. As the prosecution has not explained the thumb impression on record it renders the dying declaration fishy and suspicious; the same strongly discredits the truth thereof, and that deters us from placing reliance. Further the streak going downward from the bottom of the thumb impression indicates the master mind behind the curtain. For this reason, the dying declaration exh.7 is not at all reliable. We will now examine whether there is any other evidence on record to support the case of the prosecution.

5. In order to have corroboration the prosecution has examined Gangaben at exh.12 and Manguben at exh.13. Manguben has categorically stated about the manner in which the incident happened from the stage she saw it. According to her she and her husband had gone to village Akhol. In the evening they had come back.From the outskirt of the village they were passing on foot. When they reached near the house of Gangaben they heard the shrieks of the deceased. Hearing the shrieks, she and her husband rushed towards the house. At that time they could see that the appellant coming out ran away with electric speed. They could see that the deceased was flaring. She was shouting for help saying that her husband set her on fire . They put some quilt and mattresses on her and got the fire extinguished. By that time certain persons from the neighbourhood had collected. With their help the jeep was procured. The deceased was taken to the hospital for treatment The mother of the deceased had gone to the vegetable market. On the way she was found coming from the opposite direction. She was stopped and appraised about the incident and was made to sit in the in the jeep. Manguben is not assailed in her cross examination effectively and she firmly held her ground. Despite grilling cross examination, her versions are not at all shaken and on material particulars she has remained firm. We may say that about confessional statement made by the deceased Manguben though testified the same, it is not

called in question in the cross examination. When that material statement made by the deceased and testified by Manguben is not assailed, it should be assumed that the appellant had no cause to challenge the same; in fact he accdepted the same to be true. However, it was submitted on behalf of the appellant that the evidence of Manguben ought not to have been accepted by the learned Judge because she was the interested witness. Merely it is contended that particular witness is interested, cannot be a ground to reject the testimony of that witness. It is not the law that testimony of the interested witness must be discarded in toto. The duty of the court in that case is to weigh the evidence with care and caution and after doing so, if it is found appealing,convincing and free from doubt, the same can be accepted and necessary conclusion can be drawn. We may say that Manguben is not the interested witness, she was a passer-by and not a pawn or related to Gangaben. She does not have an axe to grind . However, for a while if she is believed to be the interested witness, her testimony cannot be discarded simply on that ground because for the reasons stated herein, her testimony is free from doubt, trust worthy and credible. She has stated unvarnished truth. There is no infirmity in her evidence. We therefore, do not see any reason to hold that her testimony is tainted with bias or colour, and incredible .

6. The testimony of Gangaben also stands on the same footing. Of course, she is the mother of the deceased but simply because she is related to the deceased her evidence cannot be discarded. As stated above, we have to carefully scan the evidence and reach the conclusion whether the evidence is reliable. With maticulous care and finicky details we have gone through the evidence of Gangaben and we see no reason to discard her evidence. Her evidence is credible and free from bias or doubt. What can be deduced from her evidence is that her son Fakirchand and daughter Gita had gone to the cinema house to see the movie while she had gone to the vegetable market. The deceased was alone in the house. When she was returning from the vegetable market she was stopped and was made to board the jeep. Seeing her daughter in piteous and groaning condition, she questioned to know. The deceased replied that after she left for vegetable market, her son in law(appellant) had come and pouring kerosene she was set to fire. Further on reaching the hospital, when the doctor started to give necessary treatment, Gangaben went to the police and lodged the complaint wherein also she consistently stated the case as alleged by the prosecution. She is not the eye

witness, but she has testified the statement made by the deceased. We may, at the cost of repetition say that the evidence of Gangaben is trustworthy and credible. It suffers from no infirmity. It is also pertinent to note at this stage that on material points she is not cross examined, and also on the statement she made about the dying declaration of the deceased. What has been suggested in the cross examination of Gangaben is, that the appellant was wrongly roped in; because the deceased had to file an application for maintenance u/s 125 Cr.P.C. It is nothing but quixotic attempt. If the deceased had filed the application for maintenance there was no reason for her to commit suicide; on the contrary, if someone was annoyed, it was none else but the appellant-accused against whom the proceedings were initiated . He might be experiening consternation as he was perhaps not in a position to meet with the case alleged and being desperate he went to the extreme recklessly. When this credible and trustworthy evidence of Gangaben and Manguben is considered it is clear that the deceased made the statement amounting to dying declaration before them involving the appellant. It may be noted that the dying declaration was made soon after the incident or at the time when she was burning . At that time she had no time to cogitate and cook up a new case other than the real one and rope in the appellant. At that time, even no one had any reason and scope to tutor the deceased who being in critical condition was in urgent need of medical treatment . Therefore, there was no possibility for anyone including the deceased to make a statement or tutor the deceased so as to involve the appellant wrongly. The statement made by the deceased therefore, and testified by these two witnesses in clear terms shows that none else but the appellant has committed the wrong as alleged. There is also another reason for committing wrong. For the last 3 years the deceased was residing at her natal- house. It was because of the ill- treatment from the appellant she was receiving. The appellant would naturally feel purturbed and must have been looked down on in the society and that would certainly generate illwill which spurt out at any time when opportunity arises. Thinking that he would get the chance to do the wrong successfully, he went to the house of his mother-in-law and committed the wrong. In view of this fact the contention of the learned advocate representing the appellant fails; and also another contention that no one would go to other's place to do the wrong. It is not unusual that a person who desires to commit a wrong would always do so at his place or at the place where he would be having all the facilities to screen him. If a man has determined to do the wrong or

retaliate, he would go wherever commission of wrong is possible. The criminology also shows that many offences have been committed at the places other than the abodes of the criminals. After all the huntsman has to go to the hunting ground where prey or victim is available. The appellant wanted to retaliate and to satisfy his ill-will he had bred, there was no way out but to go to the place where the deceased was. We are therefore, not impressed with the submissions made on behalf of the appellant.

7. It cannot be said that when the evidence of Gangaben and Manguben is weighed with care that the story they narrated sounds unnatural and untrue. For the reasons stated hereinabove their evidence suffers from no inherent improbability. On the contrary it inspires confidence leaving no room of doubt. The same cannot be brushed aside simply saying that whatever they have stated is nothing but a concoction.

8. At times the victim may not be vigilent or may not have preventive capacity or he may not have sentiency. All cannot be the seers. Sometimes because of implicit faith, one would not even dream about ill will of the nearer or dearer or relatives,despite dissensions and would be trapped by illusory or deceitful behaviour of the other side. With the ray of hope she must have believed that the appellant had come there to settle and take her to his place. The incident then abruptly happened For these reasons it cannot be said that deceased ought to have run out soon after seeing (if at all she had noticed) the appellant picking up kerosene tin. One cannot expect the human mind to work as per his own belief or notion. Placed in similar situation everyone one would not react as per the expectations of others. Hence simply because the deceased did not run out will not lead us to hold that here is the case of suicide and not murder. Let us mention again that according to Manguben, the deceased came out shouting for help and that tarnishes the contention.

9. True when the apellant was arrested his clothes were not smelling of kerosene. We must bear in mind what time after the incident he was arrested. As per the arrest panchnama exh.22, the appellant was arrested on 23.3.87 at 10.15 a.m. It may be stated that the incident happened on 22.3.87 at 5 p.m. He was thus arrested after about 17 hours. At that time, he had all chances to change the clothes, take bath and wash clothes. One

would not therefore, find smell of kerosene on the person of the accused as canvassed by the learned advocate for the appellant.

10. Our attention was drawn to the Yadi exh.8 written by the police to the executive magistrate requesting him to record the dying declaration by going to the hospital where the deceased was under treatment. That Yadi is produced at exh.8 wherein the police has written in the

body portion"Chapra Salgavata" (while setting fire to the hut) Pointing out these words, it was argued that the prosecution concocted the story later on. In fact the hut in which the deceased was residing at the time of incident was not on fire. What we find when we perused the evidence on record is that it is a mistake committed by the police for which the victim cannot suffer injustice. The yadi was written on 22.3.87 at 20.20 hours and the FIR came to be lodged on the same day at 20.15 hours. After the receipt of the FIR that Yadi has been written. It is pertinent to note that in the FIR no where "Chapra Salgavata" has been stated. When there is no iota of it in FIR and five minutes thereafter, if the police writes in the Yadi about the same, in our view it is simply the result of a slip of pen, or a bonafide mistake and that cannot be made a mountain out of a mole hill.

11. Of course Harchal Dhana exh.19 and Haribhai Tejabhai exh.20 do not fully support the prosecution and they have turned hostile. But their evidence to the extent supported by the other evidence on record cannot be overlooked; or on their evidence the the prosecution cannot be condemned. They had gone to the house where the incident happened hearing the sheirks of the deceased. They could see that the deceased was shouting for help. They do not make any statement involving the appellant.They are silent about the presence of the appellant, and his leaving the house fleetly. It appears that for them it was not possible to state so because they both rushed to the scene of incident after the appellant had run away and they had no chance to see the appellant. We cannot therefore, throw away the baby with the bathwaters. It may also be stated that some persons for one or another reason though they know the real truth suppress the truth and side with the accused. It may also be stated that some persons for one or another reason though they know the real truth suppress the truth and side the accused. It is because of intimidation, allurement, undue influence, safety to one's own existence, imminent danger or apprehension of exodus, terror, promise and the like. For such reasons some may

even make vague or evasive or misleading statements or statements capable of more than one construction. Sometimes not to displease any one, the witnesses play double game. Hence the case of the prosecution cannot be held false or condemned as fabricated. In such case other evidence has to be weighed with extra care. After doing so if the other evidence is found credible and trustworthy, it can be relied upon and appropriate conclusions can be drawn. For the reasons stated above the other evidence inspires confidence and that evidence clearly establishes the guilt of the appellant. Hence it would be unjust to accept the contention raised.

12. On no other points submissions were advanced. For the aforesaid reasons we do not see any justification to upset the finding of the learned Judge below and also the conviction and sentence. The appreciation of evidence made and conclusions drawn are quite in consonance with law. We agree with the learned Judge below . The appeal is devoid of merit and deserves to be dismissed. In the result, the appeal is hereby dismissed. The convinction and sentence inflicted by the Lower Court are maintained. for correction see original please.
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